

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



In the Matter of )  
 )  
 ) DOCKET NO. 9306  
CALIFORNIA PACIFIC MEDICAL GROUP, INC., dba )  
BROWN AND TOLAND MEDICAL GROUP, )  
 )  
a corporation. )  
 )

**ANSWER OF RESPONDENT BROWN & TOLAND**

Pursuant to Rule 3.12 of the Federal Trade Commission's Rules of Practice, Respondent California Pacific Medical Group, Inc., d/b/a Brown & Toland Medical Group (hereinafter "Brown & Toland"), answers the Complaint in the above captioned action as follows.

Except to the extent specifically admitted herein, Brown & Toland denies every allegation contained in the Complaint.

**NATURE OF THE CASE**

1. This matter concerns a horizontal agreement organized by Brown & Toland among competing physicians to agree collectively on the prices and other competitively significant terms on which they would enter into contracts with health plans or other third-party payors ("payors"). In furtherance of this illegal agreement, Brown & Toland directed its physicians to terminate pre-existing contracts with payors. Brown & Toland also approached other physician organizations and invited them to enter into horizontal agreements regarding prices or other elements of competition. Brown & Toland's conduct had the purpose and effect of raising prices for physician services in San Francisco, California.

**Answer:**

Brown & Toland denies the factual allegations in paragraph 1 of the Complaint. The characterization of the "nature of the case" in paragraph 1 of the Complaint also contains legal

conclusions, to which no response is required.

### **RESPONDENT**

2. Brown & Toland is a for profit corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 100 Van Ness Avenue, 28<sup>th</sup> Floor, San Francisco, California 94102.

#### **Answer:**

Brown & Toland admits the allegations in paragraph 2 of the Complaint, except that Brown & Toland's address is now 153 Townsend, San Francisco, California 94107.

### **JURISDICTION**

3. The general business practices of Brown & Toland, including the acts and practices alleged herein, are in commerce or affect commerce as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

#### **Answer:**

Brown & Toland admits the allegations in paragraph 3 of the Complaint.

4. At all times relevant to this Complaint, members of Brown & Toland were physicians engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as alleged herein, members of Brown & Toland have been, and are now, in competition with each other for the provision of physician services.

#### **Answer:**

Brown & Toland admits that physicians affiliated with it provide physician services, and that some physicians affiliated with it are or have been in competition with one another. Brown & Toland states that it does not typically refer to its affiliated physicians as "members." The assertion in paragraph 4 that "competition has been restrained" is a legal conclusion, to which no response is required.

## **BACKGROUND**

5. Physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significant terms, for providing health care services to enrollees of payors. Payors may also develop and sell access to networks of physicians. Such payors include, but are not limited to, health maintenance organizations (“HMOs”) and preferred provider organizations (“PPOs”). Physicians entering into such contracts often agree to reductions in their compensation to obtain access to additional patients made available by the payors’ relationship with the enrollees. These contracts may reduce the payors’ costs and permit them to lower medical care costs, including the price of health insurance and out-of-pocket medical care expenditures, for enrollees.

### **Answer:**

Brown & Toland admits that physicians enter into contracts with payors that establish terms and conditions for providing health care services to enrollees of the payors. Brown & Toland further admits that payors, including health maintenance organizations and preferred provider organizations, develop and sell access to networks of physicians. Brown & Toland is without sufficient information to admit or deny the remainder of the allegations in paragraph 5 of the Complaint; therefore, those allegations shall be deemed denied.

6. Physicians organize their practices under several models, including but not limited to, sole proprietorships, partnerships, and professional corporations (collectively “physician entities”). Absent agreements among competing physician entities on the terms on which they will provide services to the enrollees of payors, competing physician entities decide unilaterally whether to enter into contracts with payors to provide services to the payor’s enrollees, and on what prices and other terms and conditions they will accept under such contracts.

### **Answer:**

Brown & Toland admits that physicians organize their practices under several models, including sole proprietorships, partnerships, and professional corporations. Brown & Toland is without sufficient information to admit or deny the remainder of the allegations in paragraph 6 of the Complaint; therefore, those allegations shall be deemed denied.

7. Physician entities often are paid for the services they provide to health plan enrollees either by contracting directly with a health plan or indirectly by participating in independent practice associations ("IPAs"). Some physician entities participating in IPAs share the risk of financial loss with other participants if the total costs of services provided to health plan enrollees exceed anticipated levels ("risk-sharing IPA"). Physicians participating in a risk-sharing IPA also typically agree to follow guidelines relating to quality assurance, utilization review, and administrative efficiency.

**Answer:**

Brown & Toland admits that in some instances physician entities contract directly with health plans to provide services for fees, and that in other instances physician entities provide services through their participation in independent practice associations that contract with health plans. Brown & Toland further admits that some physician entities participating in independent practice associations share financial risk of loss with other participants. Brown & Toland is without sufficient information to admit or deny the remainder of the allegations in paragraph 7 of the Complaint; therefore, those allegations shall be deemed denied.

8. In order to be competitive in the San Francisco metropolitan area, a payor's health plan should include in its physician network a large number of primary care physicians and specialists who practice in San Francisco. A substantial number of the primary care physicians and specialists who practice in San Francisco are members of Brown & Toland.

**Answer:**

Brown & Toland is without sufficient information to admit or deny the allegations in paragraph 8 of the Complaint; therefore, those allegations shall be deemed denied.

**FORMATION OF BROWN & TOLAND'S PPO NETWORK**

9. Brown & Toland is a risk-sharing IPA in its contracts with HMOs to provide services to HMO enrollees who live or work in San Francisco, California. Approximately 1,500 physicians who provide physician services in San Francisco participate in, or have contracts with, Brown & Toland to provide services to the HMO enrollees under Brown & Toland's contracts with HMOs.

**Answer:**

Brown & Toland admits the allegations in paragraph 9 of the Complaint, except to the extent that paragraph 9 alleges that all of the HMO enrollees served by Brown & Toland and all of the physicians providing services through Brown & Toland are located in San Francisco, California. Brown & Toland states that it has both affiliated physicians and HMO enrollees located outside of San Francisco.

10. Beginning in 2000, Brown & Toland observed that its revenues from HMOs were declining. Brown & Toland believed this was, in part, the consequence of HMO enrollees switching to other types of health plans, such as PPOs, for the payment of physician fees and other medical costs. To capture revenue from the PPO market segment, Brown & Toland formed a PPO physician network. The Brown & Toland PPO network comprises approximately one-third of the Brown & Toland HMO physician members.

**Answer:**

Brown & Toland admits that its HMO revenues have declined in recent years. Brown & Toland also admits that it formed a PPO physician network. Brown & Toland further admits that of the approximately 1,500 physicians who participate in its HMO network, approximately 630 also participate in its PPO network. Brown & Toland otherwise denies the allegations in paragraph 10 of the Complaint.

11. Brown & Toland PPO network physicians provide services to PPO enrollees on a fee-for-service basis. To receive compensation for services, the PPO network physicians directly bill, and get paid by, the PPO enrollee or the PPO payor. The Brown & Toland PPO network physicians do not share financial risk in connection with the provision of services to PPO enrollees.

**Answer:**

Brown & Toland admits that its PPO network physicians provide services to PPO enrollees on a fee-for-service basis. Brown & Toland further admits that currently its PPO

network physicians directly bill, and get paid by, the PPO enrollee or the PPO payor. Brown & Toland is without sufficient information to admit or deny that its PPO network physicians do not share financial risk in connection with the provision of services to PPO enrollees; therefore, the allegations in the third sentence of paragraph 11 shall be deemed denied.

12. The Brown & Toland PPO network physicians have not integrated their practices through the PPO network in any significant respect. To the extent that the Brown & Toland physicians may have achieved clinical efficiencies regarding the provision of services under Brown & Toland's risk-sharing contracts, Brown & Toland has no ongoing mechanism to ensure that those potential efficiencies are replicated in services provided by its PPO network. Brown & Toland does not monitor practice patterns and quality of care, or enforce utilization standards regarding services provided by its PPO network. Brown & Toland's PPO network physicians are required to abide by the utilization management guidelines established by payors, not by Brown & Toland's risk-sharing contracts, and, as more fully alleged below, it negotiates fees for its PPO network physicians that are different from the fee schedules Brown & Toland employs for its risk-sharing contracts.

**Answer:**

Brown & Toland denies in the allegations in paragraph 12 of the Complaint.

**THE PPO NETWORK'S JOINT AGREEMENTS ON PRICES AND TERMS**

13. Brown & Toland formed the PPO network to promote, among other things, the collective economic interests of the PPO network physicians by increasing their negotiating leverage with health plans. In connection with the formation of its PPO network, Brown & Toland organized meetings among its physician members to agree upon the financial and other competitively significant contractual terms the physicians would like Brown & Toland to achieve on their behalf. Brown & Toland represented to its physician members that the activities in which they were engaging were legal.

**Answer:**

Brown & Toland admits that it organized meetings to promote its PPO network to physicians, and that it represented to its physicians that the activities in which they were engaging complied with FTC guidelines. Brown & Toland denies the remainder of the allegations in paragraph 13 of the Complaint.

14. When Brown & Toland solicited physicians to join its PPO network, it provided them with at least two fee schedules from which to choose (collectively “Brown & Toland fee schedules”). Brown & Toland represented to prospective PPO network physicians that the Brown & Toland fee schedules represented appropriate compensation for physicians providing services to PPO enrollees in San Francisco. Brown & Toland informed the physicians that by choosing one of the Brown & Toland fee schedules, the physician would be agreeing to be a PPO network physician for fees at or above the specified rate. Brown & Toland also informed its physicians that it is usually a prudent business practice to choose a higher fee schedule. Both Brown & Toland fee schedules generally represented a significant increase over the rates that physicians were currently receiving for services provided to PPO enrollees.

**Answer:**

Brown & Toland admits that at meetings to promote its PPO network, physicians were presented with two or more fee schedules. Brown & Toland further admits that physicians who joined its PPO network agreed to be PPO network physicians for fees at or above a specified rate.

Brown & Toland is without sufficient information to admit or deny that its fee schedules generally represented a significant increase over the rates that physicians were currently receiving for services provided to PPO enrollees; therefore, the allegations in the final sentence of paragraph 14 of the Complaint shall be deemed denied. Brown & Toland denies the remainder of the allegations in paragraph 14 of the Complaint.

15. When physicians joined Brown & Toland’s PPO network they chose the Brown & Toland fee schedule under which they wanted to be paid. When Brown & Toland negotiated contracts with payors on behalf of its PPO network physicians, it presented a collective rate to payors.

**Answer**

Brown & Toland admits that when physicians enter into Brown & Toland’s PPO physician agreement, they designate a “Minimum Threshold required for [the physician’s] mandatory participation in any PPO.” Brown & Toland further admits that it presented several group rates to payors. Brown & Toland denies the remainder of the allegations in paragraph 15

of the Complaint.

16. Brown & Toland's PPO network physicians agreed with Brown & Toland to refuse to contract individually, or through an agent, with any payor with which Brown & Toland was negotiating. Under the provider agreement that Brown & Toland had its PPO network physicians sign, the physicians also are prohibited from contracting with any payor for less than the Brown & Toland fee schedule that the physician chose.

**Answer**

Brown & Toland admits that its PPO physician agreement provides that the physician "shall not enter into any direct contractual agreements with any PPO contracted with" Brown & Toland; however, paragraph 16 of the Complaint fails to state that this provision has never been enforced. Brown & Toland further admits that its PPO physician agreement provides that the physician "shall not be a member, shareholder, director, officer, employee, independent contractor, participating provider or contracted provided for reimbursement levels that are below [the physician's] Minimum Threshold" rate; however, paragraph 16 of the Complaint fails to state that this provision has never been enforced. Brown & Toland otherwise denies the allegations in paragraph 16 of the Complaint.

17. After Brown & Toland formed its PPO network, it began negotiating contracts with health plans on behalf of the physicians in its PPO network. At times, when Brown & Toland believed the negotiations were proceeding unfavorably, it directed the physicians in its PPO network to cancel individual contracts the physicians may have had with the health plan. Most of the PPO network physicians, when directed, did in fact terminate individual contracts. Brown & Toland collected the physician termination letters and forwarded them to the payors. The purpose of the collective terminations was to increase Brown & Toland's negotiating leverage to obtain higher fees and other favorable competitively significant terms for physician services.

**Answer:**

Brown & Toland admits that after it formed its PPO network, it began negotiating contracts with health plans on behalf of the physicians in its PPO network. Brown & Toland



further admits that on two occasions it collected some physician termination letters and forwarded them to payors. Brown & Toland denies the remainder of the allegations in paragraph 17 of the Complaint.

**ATTEMPTS TO INDUCE COMPETING PHYSICIAN GROUPS TO JOIN  
IN BROWN & TOLAND'S COLLECTIVE NEGOTIATION**

18. During Brown & Toland's negotiations with at least one payor, Brown & Toland learned that the payor was simultaneously using a competing IPA to obtain contracts for the competing IPA's member physicians. Brown & Toland further learned that the contract many members of the competing IPA were likely to accept provided for lower fees for physician services than the contract that Brown & Toland was trying to negotiate with that payor.

**Answer:**

Brown & Toland admits that, during negotiations with a payor, Brown & Toland became aware that the payor had completed a contract with a competing PPO contracting entity for the competing entity's affiliated physicians. Brown & Toland denies the remainder of the allegations in paragraph 18 of the Complaint.

19. Brown & Toland contacted the IPA referenced in Paragraph 18 and invited that IPA to work with Brown & Toland to devise a strategy whereby Brown & Toland and the other IPA would not compete on price or other elements or terms of competition.

**Answer:**

Brown & Toland admits that it contacted California Pacific Medical Association concerning what Brown & Toland considers unprofessional comments made by California Pacific Medical Association about Brown & Toland to physicians who are affiliated with both Brown & Toland and California Pacific Medical Association. Brown & Toland, though, never invited California Pacific Medical Association or any other IPA not to compete on price or other terms of competition. Accordingly, Brown & Toland denies the allegations in paragraph 19 of

the Complaint.

20. Brown & Toland also contacted other competing IPAs and integrated medical groups and offered to negotiate with payors on behalf of those competitors or their member physicians for fee-for-service contracts at collectively determined rates.

**Answer:**

Brown & Toland admits that it discussed with another medical group (with which it had an existing integration agreement governing HMO services) the possibility of expanding the relationship to include PPO services. Brown & Toland denies the remaining allegations of paragraph 20.

### **ANTICOMPETITIVE EFFECTS**

21. As a consequence of Brown & Toland's conduct, payors agreed, among other things, to compensate Brown & Toland PPO network physicians at a higher rate than they would have compensated them absent the conduct.

**Answer:**

Brown & Toland denies the allegations in paragraph 21 of the Complaint.

22. The purpose, effects, tendency, or capacity of the conduct are, and have been, to restrain trade unreasonably and hinder competition in the provision of physician services in San Francisco, California, in the following ways, among others:

A. Price and other forms of competition among Brown & Toland's PPO network physicians have been unreasonably restrained;

B. Prices for physician services have increased; and

C. Health plans, employers, and consumers have been deprived of the benefits of competition in the purchase of physician services.

**Answer:**

Brown & Toland denies the allegations in paragraph 22 of the Complaint.

23. Brown & Toland's joint negotiations on price and other competitively significant terms for PPO contracts were not reasonably necessary to achieve potential clinical efficiencies for Brown & Toland's PPO network, nor to achieve or to maintain any clinical efficiencies which Brown & Toland's PPO network members may have realized as a consequence of participating in Brown & Toland's risk-sharing HMO products.

**Answer:**

Brown & Toland denies the allegations in paragraph 23 of the Complaint.

**VIOLATION OF THE FEDERAL TRADE COMMISSION ACT**

24. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act. These acts and practices, or their effects, will continue or recur in the absence of the requested relief.

**Answer:**

Brown & Toland states that the allegations in paragraph 24 of the Complaint constitute a legal conclusion and therefore require no response. To the extent a response is required, Brown & Toland denies the allegations in paragraph 24 of the Complaint.

**DEFENSES**

Brown & Toland states the following grounds of defense without assuming the burden of proof on any such defense that would otherwise fall upon Claimant.

**First Defense**

As its first defense, Brown & Toland asserts that the conduct at issue in this matter is ancillary to a lawful joint venture, and that the procompetitive benefits of the joint venture

outweigh any alleged anticompetitive effects.

Respectfully submitted August 4, 2003 by:

A handwritten signature in black ink, appearing to read "Richard A. Feinstein". The signature is stylized with large, flowing letters and a prominent "F".

Richard A. Feinstein

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 4, 2003 I caused to be served by U.S. Mail a copy  
of Respondent Brown & Toland's answer upon:

The Honorable Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
Room H-112  
600 Pennsylvania Ave., NW  
Washington, DC 20580;

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Paul Kunz